United Nations

AT

Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 874

Case No 975: ABBAS

Against: The Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, President; Ms. Deborah Taylor Ashford, Vice-President; Mr. Kevin Haugh;

Whereas, on 12 May 1997, Yaser Abbas, a former staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (hereinafter referred to as UNRWA or the Agency), filed an application requesting the Tribunal, inter alia:

"a. [To] reinstat[e] him to duty.
b. [To] consider [the] period of cessation as special leave with full pay.
c. [To] compensat[e] him for the injury caused to him in US dollars computed at the UN operational rate of exchange available at the time of separation.
d. [To order] payment of secretarial fees and legal expenses estimated at US$500."

Whereas the Respondent filed his answer on 6 August 1997;

Whereas the Applicant filed written observations on 26 October 1997;

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Whereas the Applicant filed an additional submission on 17 April 1998;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNRWA on 7 January 1985, on a temporary assistance contract, as a Trade Instructor (Electrician) through 8 August 1985. On 18 September 1985, the Applicant was granted a temporary indefinite appointment, as an Area staff member, in the post of Trade Instructor "B" (Electrician), at the grade 9, step 1 level, at the Damascus Training Centre (DTC), Syrian Arab Republic (SAR). At the completion of a probationary period, his appointment was confirmed on 5 October 1986. On 1 October 1989, the Applicant was promoted to the grade 10, step 5 level. The Applicant was separated from service at the close of business, 19 April 1995.

From the time he entered service through 1994, the ratings on the Applicant's periodic reports ranged from satisfactory to outstanding. In 1992, the Applicant received two letters from the Director, UNRWA Affairs, commending him on his work.

From October 1993 to January 1995, the Applicant was reprimanded several times for absenting himself from his place of duty and for smoking in the workshop in the presence of trainees. On 7 January 1995, the Principal, DTC, sent a letter to the Applicant that listed the Applicant's unauthorized absences and instances of lateness. It warned the Applicant that if there were any further complaints about his conduct, the Agency would be obliged to take appropriate action. On 9 January, 19 February, and 13 March 1995, the Principal, DTC, again noted that the Applicant was absent from duty without permission. On 20 March 1995, he was again reprimanded and on 29 March 1995, he received a written censure for further repeated absences. On 6 and 13 April 1995, the Applicant again absented himself from duty, without permission or valid reason.

On 12 April 1995, the Applicant submitted his resignation, with effect from 20 April 1995, citing as reasons (1) severe pain in his spinal cord and (2) a bad psychological and

nervous condition. By letter dated 13 April 1995, the Field Personnel Officer, SAR, informed the Applicant that despite the Applicant's insufficient notice, the Agency accepted his resignation, with effect from the close of business 19 April 1995. On 18 April 1995, the Applicant wrote to the Director, UNRWA Affairs, requesting cancellation of his resignation. In a reply dated 19 April 1995, the Field Administration Officer informed the Applicant that his request was not approved.

On 8 May 1995, the Applicant wrote to the Director of UNRWA Affairs, SAR, asking him to reconsider the Administration's decision. On 20 May 1995, the Field Administration Officer informed the Applicant that his request to withdraw his resignation would be denied, in view of "[t]he experience the Agency had with [him] last year".

On 29 May 1995, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 19 March 1997. Its findings and recommendation read, in part, as follows:

> "...
>
> (c) The Board noted that the Appellant's letter of resignation stated that he was unable to report to work because of the severe pain in his spinal cord, and a bad psychological and nervous condition. Therefore, the Board is of the opinion that this is sufficient grounds for not accepting the withdrawal of the Appellant's resignation.
>
> (d) Moreover, the Board took note of rule 109, paragraphs (1) and (3) that states:
>
> > 1. A staff member resigns who gives to the Agency a written notice of resignation as required under paragraphs 2 and 3 below. A resignation as here defined is always initiated by a staff member.
> >
> > ...
> >
> > 3. Every notice of resignation shall contain a written statement of the staff member's decision to resign, shall be signed by the staff member and shall specify the date on which he/she proposes that his/her resignation should take effect.

(e) By reference to the Appellant's personal file the Board noted that the Appellant had a turbulent career, numerous reprimands, and a letter of censure and unauthorized absence.

(f) ... the Board could not establish that the Administration's decision appealed against has been motivated by prejudice or any other extraneous factors, and resolved that the Administration has acted within the framework of standing Rules and Regulations.

IV. RECOMMENDATION

23. In view of the foregoing and without prejudice to any further oral or written submission to any party, the Appellant may deem pertinent, the Board unanimously makes its recommendation to uphold the Administration's decision appealed against and that the case be dismissed."

On 15 April 1997, the Commissioner-General transmitted to the Applicant a copy of the JAB report and informed him as follows:

"... I have carefully reviewed the Board's report and noted its conclusions. The Board noted that you had resigned because of your physical incapacity and that your career with the Agency had been turbulent. The Board was of the opinion that it had not been established that the Administration's decision not to re-employ you had been motivated by prejudice or any other extraneous factors and accordingly recommended that your appeal be dismissed.

I agree with the Board's conclusions which are consistent with the Agency's policy, set out in personnel directive A/4, of not re-employing staff members who have resigned unless there is a clear element of Agency interest in doing so. Therefore, I have accepted the Board's recommendations. Your appeal is dismissed."

On 12 May 1997, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant claims that the 13 April 1995 letter to him accepting his resignation was not dispatched until 18 April 1995. Therefore, the Applicant withdrew his resignation before the Respondent accepted it, rendering the resignation null and void.

2. The Applicant should not have been penalized for his absences. The absences only took place during hours when no classes or workshops were in session. The reprimands were part of a campaign by his supervisor to get rid of the Applicant.

3. The Applicant's resignation was the product of "pressure and oppression exercised against him".

4. The JAB Panel was biased because the Chairman was the Principal of the Amman Training Centre in Jordan, and because one member was the Principal of the DTC and was involved in the Applicant's case, having written some of the aforementioned reprimand letters to the Applicant.

5. The Applicant is entitled to be compensated in US dollars because benefits are payable in US dollars at the exchange rate available at the time of separation.

Whereas the Respondent's principal contentions are:

1. The Respondent's decision not to accept the Applicant's withdrawal of his resignation was a proper exercise of managerial discretion. A resignation is a unilateral act that does not depend on any acceptance by the Respondent. The Respondent acted in conformity with his policy not to re-employ staff members who have resigned. Although the Applicant had cited health problems as the reason for his resignation, the Applicant failed to provide any reason for subsequently seeking withdrawal of such resignation.

2. The Applicant fails to demonstrate any prejudice or improper motive on the part of the Respondent.

3. The Applicant cannot now be heard to complain about the composition of the JAB when he never raised any objections at the time that the JAB heard his case.

The Tribunal, having deliberated from 1 to 31 July 1998, now pronounces the following judgement:

I. The principal issue raised by the Applicant is whether, under the applicable rules, a resignation becomes effective only after it has been accepted by the Respondent. As discussed below, the Tribunal finds that a resignation becomes effective when submitted and does not require the Respondent's approval to become effective. Any other finding would make a staff member's desire to discontinue his or her service subject to the Respondent's control -- a result clearly not contemplated by the staff rules related to resignation. Because the Tribunal finds that the resignation was effective upon submission, the arguments by the Applicant regarding the timing of the Respondent's "acceptance" and of the Applicant's "withdrawal" are irrelevant.

II. Area staff rule 109.6, paragraph 1, states that "[a] staff member resigns who gives to the Agency a written notice of resignation as required under paragraphs 2 and 3 below. A resignation as here defined is always initiated by a staff member." Paragraphs 2 and 3 of the rule address the notice requirements. They read, in relevant part:

> "2. A staff member who resigns shall give to the Agency:
>
> (A) Such period of notice as is provided for in his/her letter of appointment; or
>
> ...
>
> (C) Such other period of notice as the Commissioner-General may at his discretion accept.
>
> 3. Every notice of resignation shall contain a written statement of the staff member's decision to resign, shall be signed by the staff member and shall specify

the date on which he/she proposes that his/her resignation should take effect."

The Tribunal finds that the Applicant's letter of 12 April 1995 complied with the essential requirements of area staff rule 109.6 since it contained written notice of the decision to resign, was signed by the Applicant and specified the date on which he proposed that the resignation should take effect.

III. The language of area staff rule 109.6, suggests, on its face, that a staff member's compliance with the conditions of the rule constitutes resignation: "[a] staff member resigns who gives to the Agency a written notice of resignation." There is no indication that the validity of the resignation is conditioned on acceptance. In addition, if the rule were to require consent in order to make resignation effective, then a staff member who wished to leave would be at the mercy of the Agency which, for either arbitrary or malicious reasons, wished to impede a staff member's departure. The Tribunal cannot conceive that the rule was intended to confer on the Agency such authority over a staff member's decision to leave.

IV. Area staff rule 109.6, paragraph 2(C), does give the Commissioner-General discretion in regard to resignations in one circumstance. If the staff member specifies a period of notice for resignation that does not comport with the terms of the letter of appointment, then "the Commissioner-General may at his discretion accept" such other period. In the case before the Tribunal, the Applicant requested that his resignation be effective eight days after the date of his letter giving notice. The Applicant's letter of appointment required him to give "not less than 30 days written notice" of resignation. Thus, the Applicant did not give the requisite notice for his resignation. It is clear from area staff rule 109.6, paragraph 2(C) that the Applicant's resignation could not have been effective eight days after he submitted his letter, without the Commissioner-General's approval. The Applicant asks the Tribunal to find that the resignation could not have been valid until

accepted by the Commissioner-General. According to this reasoning, the validity of a resignation that complies with the terms of area staff rule 109.6 in all respects, except for adequate written notice, would be rendered subject to the Commissioner-General's approval in its entirety. The Tribunal interprets area staff rule 109.6 paragraph 2(C) to give the Commissioner-General discretion regarding the date that the staff member's resignation becomes effective, rather than regarding the validity of the resignation. In addition, the Tribunal finds that the Respondent's letter accepting the Applicant's resignation (dated 13 April 1995), was adequate under area staff rule 109.6, paragraph 2(C) to make the resignation effective eight days after the date of the resignation letter of 13 April, as the Applicant requested.

V. The Applicant contends that the Respondent's decision not to accept his request to withdraw his resignation was based on prejudice and constituted an abuse of discretion. Because the Tribunal concludes that the Applicant's resignation was effective under area staff rule 109.6, the issue of the Applicant's request to withdraw his resignation is subject to rules regarding re-employment. Personnel directive A/4/Part VI/Rev.5, paragraph 3.2, provides that reappointment should be "carefully considered, and should not normally be approved unless there is a *clear element of Agency interest* in obtaining the former staff member's services again." (Emphasis added). The burden is on the Applicant to present convincing evidence when alleging that the decision not to grant re-employment is tainted by prejudice or improper motivation. (Cf. Judgement No. 553, Abrah (1992), para. IX).

VI. The Tribunal finds that the Applicant has not offered convincing evidence that the Respondent's decision was tainted by prejudice or improper motivation. The Applicant had received numerous reprimands and a letter of censure for various absences from work over a

period of nineteen months prior to his resignation. According to the record before the Tribunal, the Applicant did not appeal the various reprimands or censures. In addition, the Applicant had asserted both a medical and psychological condition as reasons for his resignation. Personnel directive A/4/Part VI/Rev.5, paragraph 3.5 establishes a presumption that employees "separated on health grounds" are "incapacitated from further service" and "should not be re-employed in any capacity." It would have been reasonable for the Respondent to accept the Applicant's asserted reasons accompanying his resignation and to be reluctant to re-employ him without a substantial Agency interest in his re-employment. Therefore, it was reasonable for the Respondent to determine that he should decline to accept the Applicant's request to withdraw his resignation. The Applicant has fallen far short of meeting his burden of producing convincing evidence of prejudice with respect to the Respondent's decision. With respect to the question of whether the Respondent abused his discretion in not accepting the Applicant's request to withdraw his resignation, the Tribunal concludes that the Respondent's decision was reasonable and did not constitute an abuse of his discretion.

VII. The Applicant also asserts that the resignation itself was the product of "pressure and oppression". The crux of this claim seems to be that the Respondent attempted to coerce the Applicant's resignation through reprimands and censures. The Tribunal agrees with the Respondent that, in a claim that a resignation was coerced, the burden of proving improper motive or coercion is on the Applicant. (Cf. Judgement No. 93, Cooperman (1965), para. XII). The Applicant argues that the fact that he resigned is, in itself, evidence of coercion because his UNWRA employment was his only potential source of income in the area. He also argues that his periodic reports were positive. In addition, the Applicant notes that his first reprimand cited absences allegedly having taken place as much as two years earlier.

Finally, the Applicant asserts that his alleged tardiness in reporting related to office hour requirements to which he, as a member of the teaching staff, should not have been subject. The Tribunal finds that the record before it does not sustain the Applicant's claim that his resignation was coerced.

VIII. The Applicant asserts that the JAB's recomendation should be invalidated due to the appearance of a conflict of interest. The JAB that heard the Applicant's initial appeal included the Principal, Damascus Training Center, who was the Applicant's supervisor and who issued the reprimands dated 7 January and 20 March 1995 which constitute part of the Applicant's coercion claim. It is a clearly established principle that the JAB should make every effort to avoid even the appearance of bias or partiality. Paragraph 10 of area staff rule 111.2 gives the parties the right to request the removal of any Board member. The Applicant failed to challenge the Principal, Damascus Training Center's participation at the time of the hearing; however, the Chairman has the authority to "excuse any member from the consideration of a specific appeal" regardless of the parties' requests. The Tribunal finds that while the Applicant erred in not challenging the participation of the Principal, Damascus Training Center, at the time of the hearing, the Chairman also erred in permitting one whose interest was so inextricably bound in the issue before the JAB so as to raise a question whether he could play an impartial role. (Cf. Judgement No. 624, Muhtadi (1993)). The Tribunal concludes that although the participation of the Principal, Damascus Training Center, should have been questioned, the recommendation of the JAB likely would not have been different, nor would the decision of the Tribunal.

IX. For the foregoing reasons, the Tribunal rejects the Applicant's pleas in their entirety.

(Signatures)

Hubert THIERRY
President

Deborah Taylor ASHFORD
Vice-President

Kevin HAUGH
Member

Geneva, 31 July 1998

R. Maria VICIEN MILBURN
Executive Secretary